

**Fugazy Continental Corp. and Aldo Capella, Albert Shiffman, Eugene Ritter, Thomas P. Green, Lloyd Lipoff, Joseph Aquila, and Paul Osit.**  
Cases 29-CA-4773, 29-CA-4817, 29-CA-4825, 29-CA-4391, 29-CA-4391-2, 29-CA-4391-3, and 29-CA-4391-4

March 26, 1982

## SUPPLEMENTAL DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND  
ZIMMERMAN

On September 14, 1977, the National Labor Relations Board issued its Decision and Order<sup>1</sup> in the above-entitled proceedings in which it directed, *inter alia*, that Respondent, Fugazy Continental Corp., its officers, agents, successors, and assigns, reinstate and make whole certain employees for losses<sup>2</sup> resulting from Respondent's unfair labor practices, violations of Section 8(a)(1), (3), and (4) of the National Labor Relations Act, as amended. On March 20, 1979, the United States Court of Appeals for the Second Circuit entered its judgment<sup>3</sup> enforcing in full the Board's Order, including its backpay provisions. A controversy having arisen over the amounts of backpay due under the terms of the Order, the Regional Director for Region 29, on May 30, 1980, issued and duly served on Respondent a backpay specification and notice of hearing, alleging the amounts of backpay due under the Board's Order and notifying Respondent that it should file a timely answer complying with the Board's Rules and Regulations, Series 8, as amended.

On July 28, 1980, Respondent filed an answer which contained general denials of the allegations in the enumerated paragraphs of the backpay specification without explaining the basis therefor. The General Counsel thereupon informed Respondent that its answer was not in conformity with applicable Board Rules and Regulations, and that, absent conformity, the General Counsel would file a Motion for Summary Judgment. Respondent on December 2, 1980, filed an amended answer which, except for paragraphs 1, 5, 8, and 10, and 7 and 13 to the extent specified *infra*, still did not conform with the applicable rules, and which contains affirmative general assertions that the claimants (without specifying which) continued to utilize their vehicles during the month of December 1975, thereby causing further expenses which must be

taken into account in reducing the total amount due each affected claimant.

Thereafter, on December 22, 1980, the General Counsel filed directly with the Board a motion to strike portions of Respondent's answer, with appendixes attached, and a Motion for Partial Summary Judgment.<sup>4</sup> The General Counsel submits that Respondent has failed to: state the basis for its disagreement with respect to certain matters alleged in the backpay specification and within its knowledge; set forth in detail its position as to the applicable premises; and furnish the appropriate supporting figures. She therefore moves that the portions of paragraphs 2, 3, 4, 6, 7, 9, 11, 12, and 13 of Respondent's answer and first amended answer be stricken. The General Counsel further moves the Board to grant partial summary judgment with respect to those allegations of the backpay specification to which assertedly no adequate answer has been submitted; i.e., paragraphs II (the backpay period), III (computation of moneys due and owing discriminatees prior to the strike), IV (computation of gross backpay), VI (net backpay), VII (franchise equity), and IX (reimbursement of car downpayment), and all appendixes thereto.<sup>5</sup> She also moves that Respondent be precluded from adducing evidence with respect to issues not properly raised in its answer. Subsequently, on January 21, 1981, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Partial Summary Judgment should not be granted. Respondent thereafter filed a response to the Notice To Show Cause.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

### Ruling on the Motion for Partial Summary Judgment

Section 102.54 of the Board's Rules and Regulations, Series 8, as amended, provides, in pertinent part, as follows:

(b) . . . The respondent shall specifically admit, deny, or explain each and every allega-

<sup>1</sup> 231 NLRB 1344 (1977).

<sup>2</sup> The Administrative Law Judge also ordered Respondent to complete the sale of a limousine to David Miller, as it had previously contracted to do.

<sup>3</sup> 603 F.2d 214.

<sup>4</sup> On December 27, 1980, Respondent filed a second amended answer "to correct deficiencies in typographical transmission" pertaining to its answer, which acknowledges that the "General Counsel is in no respect prejudiced by the amendments herein."

<sup>5</sup> The General Counsel does not seek partial summary judgment for those discriminatees listed in the backpay specification concerning whom information regarding gross backpay, interim earnings, and other information is as yet unknown.

tion of the specification, unless the respondent is without knowledge, in which case the respondent shall so state, such statement operating as a denial. Denials shall fairly meet the substance of the allegations of the specification denied. When a respondent intends to deny only a part of an allegation, the respondent shall specify so much of it as is true and shall deny only the remainder. As to all matters within the knowledge of the respondent, including but not limited to the various factors entering into the computation of gross backpay, a general denial shall not suffice. As to such matter, if the respondent disputes either the accuracy of the figures in the specification or the premises on which they are based, he shall specifically state the basis for his disagreement, setting forth in detail his position as to the applicable premises and furnishing the appropriate supporting figures.

(c) . . . If the respondent files an answer to the specification but fails to deny any allegation of the specification in the manner required by subsection (b) of this section, and the failure so to deny is not adequately explained, such allegation shall be deemed to be admitted to be true, and may be so found by the Board without the taking of evidence supporting such allegations, and the respondent shall be precluded from introducing any evidence controverting said allegation.

Our examination of the pleadings herein reveals that paragraphs 2, 3, 4, 5, 6, 9, 11, and 12 of Respondent's answer and amended answer either deny generally or fail to explain adequately allegations of the specification. In addition, in its denials of paragraphs II, III, VI, and IX of the backpay specification, Respondent does not state the basis for its disagreement with the allegations contained therein, or offer or set forth in detail with supporting figures, any alternative premises. Further, in its denial of paragraph IV, Respondent alleges it has "insufficient information as to the accuracy of the amounts calculated as owing to the discriminatees," but has not proffered any alternative position nor submitted evidence, with supporting documentation of these matters, which clearly are within Respondent's possession and control. Although the General Counsel does not seek partial summary judgment as to paragraph V (interim earnings), she does seek partial summary judgment as to paragraph VI (net backpay). As noted *supra*, Respondent's answers made general denials to those paragraphs of the backpay specification, and inasmuch as the general denial on the issue of interim earnings is directly related to the computation and ac-

curacy of net backpay, which, in turn, is dependent upon the data derived from interim earnings, these general denials are sufficient to require a hearing on the issue.<sup>6</sup> Accordingly, we shall deny the General Counsel's motion to strike paragraph 6 of Respondent's answers and her Motion for Partial Summary Judgment as to paragraph VI of the backpay specification and appendixes B (except for subsec. I, gross backpay) and C. We grant the General Counsel's motion to strike paragraphs 2, 3, 4, 9, 11, and 12, and any appendixes thereto of Respondent's answers because they are nonresponsive and not in conformity with the Board's Rules and Regulations, *supra*.<sup>7</sup> We also grant the General Counsel's Motion for Partial Summary Judgment with respect to the allegations contained in paragraphs II, III, IV, and IX and Appendix A and subsection I of Appendix B of the backpay specification because Respondent's answers thereto are general denials and not adequately explained, and, therefore, are deemed to be admitted as true. In addition, Respondent shall be precluded from introducing into evidence any controverting issues not properly raised in its answers.<sup>8</sup>

As to paragraph VII of the backpay specification, the Board affirmed Administrative Law Judge Silberman's Decision wherein he discussed the franchise agreement that had existed between the franchise drivers, herein the discriminatees, and Respondent, and wherein he ordered that:

If between the date on which each franchise driver should have been offered reinstatement and the date on which Respondent does offer him unconditional reinstatement the value of his franchise has fallen, that is a capital loss which the franchise driver will suffer due to no fault on his part. Accordingly, in order to make the franchise drivers whole for all losses suffered by reason of Respondent's discrimination against them, I shall also recommend that Respondent pay to each franchise driver the difference between the value of his franchise as of the date on which Respondent should have offered that driver reinstatement to his former position and the date on which Respondent does offer him reinstatement.

<sup>6</sup> *Dews Construction Corp. a subsidiary of the Aspin Group, Inc.*, 246 NLRB 945 (1979); *Marine Machine Works, Inc.*, 256 NLRB 15 (1980).

<sup>7</sup> *Aircraft Upholstering Company, Inc. and Its General Manager, William Cohen*, 228 NLRB 462 (1977).

<sup>8</sup> Allegations concerning depreciation of vehicles owned and operated by discriminatees Lipoff, Manzione, Miller, Richer, Ritter, Roane, E. and H. Seltzer, and Shiffman are based in part of information not in Respondent's possession; i.e., the drivers' own tax records. Therefore, the General Counsel does not seek partial summary judgment as to their gross/net backpay.

Respondent, in paragraphs 7 to 13 of its answer to paragraph VII, submits that the franchises have appreciated in value; that the Administrative Law Judge's ruling is limited to a capital loss situation; that his recommendation that Respondent repurchase or liquidate the franchises is inconsistent with his further requirement that Respondent restore the discriminatees to their former positions; and that the Board is not empowered, under Section 10(c) of the Act, to effect a "make whole" relief by ordering reimbursement of a "franchise equity." The General Counsel contends that Respondent is challenging a remedy already decreed, and that Respondent has an obligation, under judgment of the court of appeals, to make the discriminatees whole for this aspect of the losses suffered by virtue of Respondent's unlawful termination of their franchise. The General Counsel contends further that Respondent's answer should be stricken because it lacks substantial specificity and therefore summary judgment should be granted on this issue.

The judgment of the court has no immediate relevancy to the issues raised by the General Counsel's motion. Moreover, we find paragraphs 7 and 13 of Respondent's answer to be sufficiently specific to constitute a denial of specification paragraph VII.

Accordingly, we find that Respondent's contentions regarding the value of the franchises and the Administrative Law Judge's ruling which narrowed the scope of the issue of franchise equity to "capital loss situations" raise sufficient controversy to warrant a hearing on paragraph VII of the backpay specification and, consequently, we shall deny the General Counsel's motion to strike paragraphs 7 and 13 of the answer.

In summary, the Board finds that the allegations set forth in paragraphs II, III, IV, and IX of the backpay specification and Appendix A and subsection I of Appendix B are deemed to be admitted to be true, and grants the General Counsel's Motion for Partial Summary Judgment with respect to those paragraphs. We further find that the net amounts due employees for work performed during the months of November and December 1975 and the reimbursement of David Miller's car downpayment are as stated in the computations of the specification and as set forth in the Order herein, and that payment thereof be made by Respondent to each named employee.

### ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Fugazy Continental Corp., Queens, New York, its

officers, agents, successors, and assigns, shall make whole each of the employees named below by payment to each of them the amounts herein specified as due for November and December 1975, with interest thereon accrued at the rate of 6 percent per annum,<sup>9</sup> until payment is made of all such amounts due as provided in our original Order, less tax withholdings required by Federal and state laws:

	<i>Due For Nov/Dec</i>
Aquila, J.	\$ 359.89
Capella, A.	575.64
Doca, F.	230.92
Evans, C.	-0-
Feinstein, H.	-0-
Gans, M.	1,010.76
Grady, A.	-0-
Green, T.	-0-
Knotti, E.	1,397.32
LeGrady, S.	778.30
Lewis, E.	274.48
Lipoff, L.	1,279.36
Manziona, L.	720.76
McCann, D.	1,521.97
Meyer, G.	306.43
Miller, D.	Unknown
Monahan, T.	1,320.62
Moore, E.	932.68
Osit, P.	Unknown
Osteerhoudt, M.	-0-
Pepper, S.	360.86
Richter, A.	3,207.21
Ritter, E.	1,457.11
Roa, C.	487.48
Roane, E.	1,410.47
Salamone, A.	442.60
Sanguedolce, N.	233.81
Scalavino, F.	141.47
Seltzer, E.	976.68
Seltzer, H.	845.21
Shiffman, A.	1,775.46
Tusa, M.	771.62
Vieto, J.	1,692.83
Wall, M.	Unknown

IT IS FURTHER ORDERED that the above-named Respondent pay to David Miller the sum of \$5,000 (par. IX), which may be adjusted downward by the General Counsel to reflect a reasonable use charge for the period beginning July 1975 and ending January 1976.

<sup>9</sup> Inasmuch as the court of appeals enforced the Board's Order providing for interest to be paid at the rate of 6 percent, that rate shall be used in computing interest due on backpay. See *Florida Steel Corporation*, 234 NLRB 1089 (1978).

IT IS FURTHER ORDERED that this proceeding be, and it hereby is, remanded to the Regional Director for Region 29 for the purpose of arranging a backpay hearing before an administrative law judge

on all such allegations in the backpay specification and all appendixes thereto that remain in issue, and that said Regional Director shall be, and he hereby is, authorized to issue notice thereof.